

STATE OF MICHIGAN  
IN THE SUPREME COURT

DEBORAH SUE NICKE,

Plaintiff-Appellee,

Supreme Court No. 130666

vs.

Court of Appeals No. 263929

KENNETH MICHAEL MILLER,  
AUTOMOTIVE RENTALS, INC.,  
HIGH VOLTAGE MAINTENANCE  
CORPORATION, and EMERSON  
ELECTRIC COMPANY,

Wayne County Circuit  
Court No. 03-335375 NI

**Oral Arguments on Defendants-Appel-  
lants' Application will be held on  
November 15, 2006.**

Defendants-Appellants,

and

JUAN HERNANDEZ-MORENO and  
STATE FARM MUTUAL AUTO  
INSURANCE COMPANY,

Defendants.

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NOTICE OF HEARING

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INSURANCE INSTITUTE OF MICHIGAN'S MOTION  
TO PARTICIPATE AS AMICUS CURIAE IN SUPPORT  
OF DEFENDANTS-APPELLANTS

PROOF OF SERVICE

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**FILED**

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MICHIGAN SUPREME COURT

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**INSURANCE INSTITUTE OF MICHIGAN'S MOTION  
TO PARTICIPATE AS AMICUS CURIAE IN SUPPORT  
OF DEFENDANTS-APPELLANTS**

NOW COMES the INSURANCE INSTITUTE OF MICHIGAN (IIM), by its attorneys, GROSS, NEMETH & SILVERMAN, P.L.C., and in support of its request to participate as amicus curiae pursuant to MCR 7.306(D), states as follows:

1. The primary issue in this appeal is whether Plaintiff-Appellee, DEBORAH SUE NICKE, sustained a "serious impairment of body function", as defined in §3135(7) of the No-Fault Act, MCL 500.3135(7). According to Plaintiff, her primary accident-related injuries were:

- (a) A mild herniated disc at C5-6, and a disc bulge at C6-7. One year after the accident, Plaintiff successfully underwent a cervical discectomy.
- (b) A full thickness tear of the rotator cuff in the right shoulder. Fifteen months after the accident, Plaintiff successfully underwent an acromioplasty.

2. The interpretation and parameters of the "serious impairment" threshold for recovery of non-economic damages is of great interest to IIM and its members, as evidenced by IIM's participation as an amicus curiae in Straub v Collette -- the companion case to Kreiner v Fischer, 471 Mich 109 (2004). If a plaintiff sustained a serious impairment of body function, she can recover all past and future non-economic damages, including those time periods when the impairment is no longer serious. Byer v Smith, 419 Mich 541 (1984).

3. IIM is a government affairs and public information association. IIM represents 41 property/casualty insurance companies, and another 49 related organizations, operating in Michigan. IIM's member companies provide insurance to 73% of Michigan's automobile market. IIM serves the Michigan insurance industry and insurance consumers by acting as a central focal point for educational, media, legislative and public information on insurance issues.

4. IIM agrees with Defendants-Appellants' explanation of Plaintiff's pre-existing cervical and shoulder problems, the circumstances of the accident, Plaintiff's subsequent treatment, and the impact of the alleged injuries on Plaintiff's life. The key facts are as follows:

- (a) On November 29, 2000, a vehicle driven by Defendant, KENNETH M. MILLER, rear-ended Plaintiff's pickup truck at a low rate of speed. The collision caused minimal damage to Plaintiff's truck, and Plaintiff did not request medical assistance at the scene.
- (b) Plaintiff went to an emergency room later that day, complaining solely of neck pain radiating down her right arm. The resulting diagnosis was cervical strain, with a prior history of cervical fusion and degenerative joint and disc disease. Plaintiff's complaints of right shoulder pain arose at a later date.
- (c) Plaintiff was employed by GMAC as a customer service specialist -- a sedentary job. Per her physician's recommendation, Plaintiff missed three weeks of work after the accident. In September 2001, Plaintiff accepted a six-month voluntary buyout agreement from GMAC due to corporate downsizing.
- (d) Prior to her surgeries, Plaintiff received conservative treatment for her neck and right shoulder complaints, e.g., medication, epidural injections, and physical therapy. As will be explained, Plaintiff's recuperation from her surgeries was

typical and unremarkable.

- (e) Plaintiff claims that her injuries and continuing pain have affected her ability to work, perform household chores, and engage in recreational activities. However, except for her initial three-week absence from work, and her surgical recuperations, no physician has imposed physical restrictions on Plaintiff's activities.

5. The trial court held, and Court of Appeals agreed, that Plaintiff's pre- and post-accident lifestyles were not substantially different, Plaintiff's general ability to lead her normal life had not been affected, and Plaintiff had not suffered a permanent serious impairment of body function. However, the Court of Appeals reversed the trial court's conclusion that Defendants were entitled to summary disposition, and remanded this case for a determination of whether Plaintiff's corrective surgeries resulted in a temporary serious impairment.

6. By order dated June 9, 2006, this Court ordered oral arguments on Defendants-Appellants' application leave to appeal, and directed the parties to address "whether the Court of Appeals erred by remanding the case to the trial court for consideration of whether plaintiff suffered a temporary serious impairment of body function." Oral arguments will be held on Wednesday, November 15, 2006.

7. IIM believes that the Court of Appeals' opinion is erroneous and should be reversed either by peremptory order, or after full consideration on leave granted. If this Court grants Defendants' application for leave to appeal, IIM requests permission to file an amicus curiae brief. IIM's position is as follows.

8. Procedurally, the Court of Appeals erroneously remanded this case to the trial court for a determination of whether Plaintiff sustained a "temporary" serious impairment of body function because:

- (a) In response to Defendants' motion for summary disposition under MCR 2.116(C)(10), Plaintiff was required to set forth specific facts showing that a genuine issue of material fact exists. Plaintiff was also required to submit substantively admissible evidence to establish those facts. Maiden v Rozwood, 461 Mich 109, 120-121 (1999); MCR 2.116(G)(4)-(6). Plaintiff should not be given a second opportunity to avoid summary disposition.

(b) In any event, the parties did submit all existing evidence pertaining to Plaintiff's surgeries to both lower courts, and this Court. The relevant medical records (which were obtained from Plaintiff's answer to Defendants' application) are attached to this motion.

(c) The trial court's ruling that Plaintiff did not sustain a serious impairment of body function and, therefore, Defendants are entitled to summary disposition, is subject to de novo review. Kreiner, supra, 129. Accordingly, the Court of Appeals (as well as this Court) can decide this issue based on the existing evidence.

9. Substantively, the attached medical records establish that Plaintiff never sustained a serious impairment of body function, even on a temporary basis. Plaintiff's recuperation after each surgery was short, unremarkable, and virtually complete. Thereafter, Plaintiff was generally able to continue leading her normal life -- a conclusion which both lower courts reached.

10. The evidence regarding Plaintiff's cervical surgery and recuperation (Appendix A) is as follows:

(a) On November 21, 2001, Plaintiff underwent a cervical discectomy at C5-6 and C6-7, with fusion and plating. Plaintiff was discharged from the hospital the following day with a cervical collar.

(b) During her first follow-up visit three weeks later (December 13, 2001), Plaintiff reported that her left radiculopathy had totally resolved, and that her neck pain was almost completely relieved. Her wound was well healed, and x-rays showed excellent screw placement and bone graft. Plaintiff had some problems swallowing and with her voice, but she was doing well. Plaintiff's surgeon was happy with the results, and instructed Plaintiff to wear the cervical collar another three weeks.

(c) An MRI of Plaintiff's cervical spine was taken January 29, 2002. The fused discs appeared solid, and there was no herniation, canal or foraminal stenosis at those levels. The remainder of Plaintiff's cervical spine appeared normal.

(d) On March 28, 2002, Plaintiff's surgeon wrote that the wound had healed, x-rays showed fusion, and Plaintiff was doing well. No further visits were necessary, except on a "as needed" basis.

(e) Between March 18 and April 15, 2002, Plaintiff underwent 10 sessions of physical therapy for both her neck and right shoulder. Plaintiff was discharged from therapy because she did not return for further treatment. At the time of her last visit, Plaintiff had tolerated treatment well, and had completed activities with little

difficulty.

11. The evidence regarding Plaintiff's shoulder surgery and recuperation (Appendix B) is as follows:

- (a) On February 21, 2002, Plaintiff underwent, on an outpatient basis, an open acromioplasty on her right shoulder to repair the rotator cuff tear. She was given a prescription for Vicodin, and instructed to wear an arm sling on a full-time basis.
- (b) On her first follow-up visit five days later, there was mild swelling in the right shoulder consistent with the surgery. Plaintiff's neurovascular status was intact to her right upper limb. Plaintiff was not wearing her arm sling. Plaintiff's surgeon told her to wear the sling full-time for three to four weeks.
- (c) On March 5, 2002, the sutures were removed without difficulty. Plaintiff continued to complain of pain in her right shoulder. Plaintiff admitted that she was not wearing her arm sling at night. Plaintiff's surgeon again instructed Plaintiff to wear the sling 24 hours per day, and prescribed physical therapy beginning March 18, 2002.
- (d) During her next visit on March 26, 2002, Plaintiff had fewer shoulder complaints, and was taking less Vicodin because her symptoms were improving on a daily basis. The surgical wound was well healed, and Plaintiff was able to elevate and abduct her shoulder to approximately 80° without pain. Plaintiff was given another prescription for Vicodin for night time pain relief, and instructed to continue physical therapy for three more weeks.
- (e) On March 28, 2002, Plaintiff's surgeon wrote that Plaintiff was doing well vis-a-vis her right shoulder. No further visits were necessary, except on an "as needed" basis.
- (f) Between March 18 and April 15, 2002, Plaintiff underwent 10 sessions of physical therapy for both her right shoulder and neck. Plaintiff was discharged from therapy because she did not return for further treatment. At the time of her last visit, Plaintiff had tolerated treatment well, and had completed activities with little difficulty.

12. Plaintiff did not miss any time from work after either surgery because she had voluntarily accepted a buyout agreement from her employer in September 2001. Plaintiff began another full-time job in October 2002.

13. IIM fully concurs with the Defendants' analysis and application of the rules articulated in

Kreiner. While an injury need not be permanent to satisfy the "serious impairment" threshold, a temporary injury must be of sufficient severity and duration to meet the threshold. Kreiner, supra, 135. For example, a person who successfully recovers from a life-threatening injury that required extensive care and rehabilitation should be allowed to recover non-economic damages. In contrast, Plaintiff's alleged injuries never satisfied the "serious impairment" threshold.

14. In addition, the Court of Appeals' opinion conflicts with the following comparable cases, which held that the plaintiff's temporary injuries did not satisfy the "serious impairment" threshold:

- (a) Straub, 471 Mich at 122, 134-136 (fractured finger required surgery and casting; four-month recuperation).
- (b) Cook v Hardy, 474 Mich 1010 (2006) (fractured tibia and fibula required casts and crutches for six to eight weeks).
- (c) Netter v Bowman, \_\_\_ Mich App \_\_\_ (2006) (Court of Appeals Docket No. 268571, rel'd 9/19/06) (radiculopathy, myositis, and cervical myofascial pain syndrome; plaintiff reached pre-injury status within six months after accident).
- (d) Moore v Cregeur, 266 Mich App 515, 519 (2005) (multiple rib fractures and injuries, and collapsed lung).


15. Finally, allowing the Court of Appeals' decision to stand could encourage similar temporary "serious impairment" claims. For example, shortly after this decision was issued, another Court of Appeals panel held that the plaintiff could recover non-economic damages for a temporary serious impairment. Jones v Olson, unpublished opinion per curiam of the Court of Appeals, decided 9/21/06 (Docket No. 268929); lv app pending, Supreme Court Docket No. 132385 (stable fracture at C7 was conservatively treated with a cervical collar, medication and physical therapy; plaintiff returned to unrestricted, full-time heavy construction six months after the accident). Such decisions would seriously erode the rules this Court adopted in Kreiner.

WHEREFORE, the INSURANCE INSTITUTE OF MICHIGAN respectfully requests this Honorable Court to PEREMPTORILY REVERSE the Court of Appeals' opinion dated January 26,

2006, and REINSTATE the trial court's order granting summary disposition to Defendants-Appellants.

Alternatively, if Defendants-Appellants' application for leave to appeal is granted, the INSURANCE INSTITUTE OF MICHIGAN requests permission to file an amicus curiae brief.

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Dated: November 13, 2006

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